

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|-----------------------------------|---|--------------------|
| LADONNA STAGE |) | |
| Claimant |) | |
| VS. |) | |
| |) | |
| BOEING COMPANY |) | Docket No. 239,019 |
| Respondent |) | |
| AND |) | |
| |) | |
| INSURANCE COMPANY STATE OF |) | |
| PENNSYLVANIA |) | |
| Insurance Carrier |) | |

ORDER

Claimant appealed the March 30, 2000 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument on August 30, 2000.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for claimant. Vaughn Burkholder of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a series of traumas from September through December 11, 1998, which resulted in bilateral upper extremity injuries and surgery on both wrists. In the March 30, 2000 Award, Judge Barnes found that claimant returned to work for respondent after recovering from her injuries and that she was later terminated for excessive absences, which were unrelated to the work-related injury. Therefore, the Judge limited claimant's permanent partial general disability to claimant's 10 percent whole body functional impairment rating.

Claimant contends Judge Barnes erred. Claimant argues that she was improperly terminated and, therefore, should be awarded a work disability. Conversely, respondent and its insurance carrier argue that the Award should be affirmed.

The only issue before the Appeals Board on this review is whether claimant's permanent partial general disability should be based upon the functional impairment rating or a work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. After reviewing the record and considering the parties' arguments, the Appeals Board concludes the Award should be affirmed. The Appeals Board adopts the findings and conclusions set forth in the Award.
2. Claimant developed bilateral carpal tunnel syndrome while working for respondent. After claimant underwent right wrist surgery in December 1998 and left wrist surgery in January 1999, respondent was able to accommodate claimant's work restriction of task rotation and still return claimant to her regular job.
3. Claimant was terminated at the end of April 1999 for excessive absences, which were unrelated to claimant's work-related injury.
4. Because bilateral upper extremity injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e, which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*¹ and *Copeland*.² In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages should be based upon their ability rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .³

5. Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.⁴

6. The Appeals Board has further interpreted K.S.A. 1998 Supp. 44-510e as requiring workers to make a good faith effort to retain their post-injury employment. The Board has held that workers who are performing accommodated work should advise their employer of any problems working within their medical restrictions and should afford the employer a reasonable opportunity to adjust the accommodations.

7. On the other hand, employers must also act in good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine⁵ or not within the worker's medical restrictions,⁶ or where the worker is fired after attempting to work within the medical restrictions and experiences increased symptoms.⁷

¹ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

² *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

³ *Copeland*, p. 320.

⁴ *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, rev. denied ____ Kan. ____ (1998).

⁵ *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

⁶ *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

⁷ *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

8. Contrary to claimant's contentions, the Appeals Board concludes that claimant violated respondent's company rules and that claimant's termination was neither in bad faith nor improper. Therefore, for purposes of determining claimant's permanent partial general disability, the post-injury wage that claimant was earning after she returned to work for respondent following the wrist surgeries should be imputed for the period following claimant's termination. Because that wage was at least 90 percent of the pre-injury average weekly wage, claimant's permanent partial general disability should be based upon the 10 percent whole body functional impairment rating.

AWARD

WHEREFORE, the Appeals Board affirms the March 30, 2000 Award entered by Judge Barnes.

IT IS SO ORDERED.

Dated this ____ day of September 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Vaughn Burkholder, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director